UNITED
NATIONS

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General Assembly Security Council

Distr.
GENERAL

A/47/920
S/25512
2 April 1993

ORIGINAL: ENGLISH

GENERAL ASSEMBLY
Forty-seventh session
Agenda item 143
THE SITUATION IN BOSNIA AND
HERZEGOVINA

SECURITY COUNCIL
Forty-eighth year

Letter dated 31 March 1993 from the representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia and Senegal to the United Nations addressed to the Secretary-General

On behalf of the members of the Organization of the Islamic Conference, and in our capacity as members of the Contact Group of OIC on Bosnia and Herzegovina, and pursuant to paragraph 2 of Security Council resolution 808 (1993) of 22 February 1993, we have the honour to submit, attached to the present letter, the text of the recommendations of OIC on the establishment of an ad hoc international war crimes tribunal for the territory of the former Yugoslavia (see annex).

We would be grateful if the present letter and its annex could be circulated as a document of the General Assembly, under agenda item 143, and of the Security Council.

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ANNEX

Recommendations of the Organization of the Islamic Conference on the establishment of an ad hoc International War Crimes Tribunal for the territory of the former Yugoslavia

I. AUTHORITY, JURISDICTION AND COMPETENCE OF THE TRIBUNAL

1. An ad hoc Tribunal shall be established pursuant to a Security Council resolution under Chapter VII of the Charter of the United Nations to prosecute war crimes and crimes against humanity committed in the territory of the former Yugoslavia on or after 1 January 1991.

2. The Statute of the Tribunal shall be approved by the General Assembly within 30 days of the date of adoption of a resolution by the Security Council establishing the Tribunal, under Chapter VII.

3. Funding of the Tribunal should be authorized by the General Assembly.

4. All Member States are obliged to cooperate with and support the Tribunal and its various organs and to enforce its orders and decisions, and to arrest and transfer indicted persons to the jurisdiction of the Tribunal.

5. No State or individual shall have the right to challenge the Tribunal's establishment, its applicable law, judicial composition, organizational structure, jurisdiction or competence. Any challenge of a procedural nature shall be exclusively heard and decided by the Tribunal in accordance with its procedures and rules.

6. The Tribunal's jurisdiction over individuals is exclusive and cannot be defeated by any national exercise of jurisdiction. Subject to the primary jurisdiction, any Member State can exercise its jurisdiction on the basis of the theory of universality.

II. APPLICABLE LAW

1. The crimes over which the Tribunal shall exercise its jurisdiction and the applicable law shall be as follows:

(a) War crimes, violations of the Geneva Conventions of 12 August 1949 and of the Additional Protocols of 10 June 1977, as well as any other war crime under customary international law and other relevant treaties;

(b) Genocide, violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(c) Crimes against humanity, as defined in articles 6 (c) and 5 (c) of the London and Tokyo Charters, respectively, and as further developed by customary international law, which includes: murder, torture, mutilation, rape, reducing or keeping a person in a state of slavery, servitude or forced labour, deporting or forcibly transferring populations, systematic pillage and looting, systematic

destruction of public and private property, when committed as part of a policy of persecution on social, political, racial, religious or cultural grounds;

(d) Torture, in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984.

2. The Tribunal shall be competent to try persons accused of responsibility for such crimes at any level, whether as leaders, intermediaries or subordinates, and no form of immunity shall be deemed a bar to prosecution.

3. The fact that an individual is performing official duties shall not be a defence.

4. The order of a superior shall not be a defence.

III. GUIDING PRINCIPLES ON PENALTIES, PROCEDURES AND EVIDENCE

1. The Tribunal shall investigate, prosecute, judge and impose penalties on those individuals found guilty in accordance with the applicable law and procedures of the Tribunal based on respect of the rights of the victims and the accused.

2. Basic principles, norms and standards of due process and procedural fairness recognized by international human rights and international humanitarian law shall be established in the Statute. The Tribunal shall, in accordance with those principles, promulgate detailed rules of procedure and evidence before it commences operations.

3. The Statute shall set forth provisions for the Tribunal with respect to evidentiary matters, including in particular those necessary for the protection of victims and witnesses from reprisals and embarrassment, the more so with respect to victims of torture and rape.

4. There shall be a victim compensation scheme.

5. Governments found responsible for crimes committed by individuals in the service of such Governments or acting for and on behalf of such Governments should be required under principles of State responsibility to pay such compensation.

6. Penalties shall be promulgated by the Tribunal before it starts adjudicating cases but on the basis of provisions established in the Statute. Penalties shall be based on "general principles" of law as they exist in the world's major legal systems.

7. Accused persons who refuse to appear before the Court or are not surrendered to the Tribunal shall be the subject of a public indictment accompanied by an internationally valid warrant for their arrest to be executed by all Member States.

8. All Member States shall have jurisdiction to prosecute a person charged with a crime by the Tribunal if the Tribunal is no longer in existence.

9. The principle ne bis in idem shall apply to the Tribunal's judgements. The Tribunal, however, shall not be bound by the exercise of jurisdiction of any State if it deems that the national proceedings were conducted for the purposes of defeating the Tribunal's jurisdiction or that the proceedings were designed to shield the accused from criminal responsibility.

IV. COMPOSITION OF THE TRIBUNAL

1. The Tribunal's organs shall be composed of:

(a) The Court;

(b) The Procurator-General;

(c) The Secretariat.

2. The Court shall consist of seventeen judges, one of whom shall be elected by them to be the President, and an equal number of alternate judges to serve as alternate for any judge unable to fulfil his or her judicial functions.

3. The judges shall be persons of high competence in international criminal law and human rights law, of high moral integrity, impartiality and independence. They shall represent, on an equitable geographic basis, the world's major legal systems, with particular representation from the Islamic countries and with due regard to gender representation.

4. The General Assembly and Security Council shall elect the judges along the lines of the procedure for the election of judges to the International Court of Justice.

5. The Court shall be divided in three adjudicating chambers, one indicting chamber and one appellate chamber. All chambers except the latter shall consist of three judges, the appellate chamber of five judges.

6. The appointment of judges to the chambers shall be done by a random system established by the rules of the Court.

7. The Secretary-General of the United Nations shall appoint an independent Chief Prosecutor with demonstrated expertise and commitment, on the basis of recommendations by Member States.

8. The Chief Prosecutor shall appoint, direct and supervise a staff of deputy and assistant Prosecutors, as well as a staff of investigators. The deputy and assistant Prosecutors shall include representatives on an equitable geographic basis, from the world's major legal systems, with particular representation from the Islamic countries and with due regard to gender representation.

9. The Chief Prosecutor shall publicize all indictments, alerting all Member States to apprehend any indicted persons within their borders and to submit them to the jurisdiction of the Tribunal.

10. The Prosecutors shall have the duty to prosecute all cases where substantiated charges are made.

11. The Chief Prosecutor shall not have the authority to grant immunity from prosecution without the consent of the indicting chamber and only in cases where it is demonstrated to be in the best interest of justice.

12. The Prosecutors shall receive full cooperation from Member States, including the cooperation of law enforcement agencies.

13. The Prosecutor's office shall be properly funded and shall have sufficient resources to conduct investigations, secure credible evidence, hire appropriate experts, store and organize evidence, engage the participation of witnesses and victims, and provide appropriate protection to witnesses and victims.

V. ADJUDICATION

1. The Tribunal shall respect the rights of victims and witnesses and shall, where appropriate, provide for:

(a) Protection of the identities of witnesses and victims;

(b) Hearing of evidence in camera;

(c) Reception of evidence by means of affidavits, video tape and recordings, provided that the Tribunal may, at its discretion, require affiants to appear for cross-examination; and

(d) Conduct special hearings at locations within the territory of the former Yugoslavia.

2. Defendants shall have the right to apply to the Tribunal for release pending trial or modification of detention measures. The Tribunal shall permit release only upon being satisfied that the defendant is not likely to flee, not likely to constitute a threat to international peace and security, and not likely to intimidate or endanger potential witnesses. In such cases, the Tribunal shall require the posting of an appropriate bond to secure the appearance of the defendant at the trial.

3. Defendants who are unable to pay for legal assistance shall have the right to have counsel appointed.

4. Each trial before the Tribunal shall be heard by at least three judges and at least one alternate in the event a judge becomes incapacitated.

5. Judgements shall be rendered by a majority and each judgement shall state the findings of fact and conclusions of law made by the Tribunal.

VI. SENTENCING, PENALTIES AND APPEALS

1. Upon determination of guilt, a separate hearing shall be held on sentencing. At the sentencing hearing, the prosecution and defence may present evidence of aggravation or mitigation, and witnesses and victims shall be permitted to present relevant testimony.

2. Considering the gravity of the crimes alleged, the Tribunal shall have authority to render all appropriate penalties and to supervise their execution.

3. The Tribunal shall have authority to order confiscation and/or restitution of the proceeds of the criminal conduct and to order damages to compensate victims for their injuries and losses arising from the criminal conduct.

4. The prosecution and the defence may appeal a judgement where it is shown that:

(a) There is newly discovered evidence which would probably alter the judgement and which by due diligence could not have been discovered at the time the judgement was entered;

(b) A fraud upon the Tribunal was committed which substantially affected the judgement; or

(c) The facts proved do not constitute a crime within the jurisdiction of the Tribunal;

(d) The judgement is in error as to the law or facts.

5. Pardons shall not be granted and sentences shall not be reduced, except by a pardon board established by the Security Council.